IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.01.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.135 of 1997

Govindaroyan .. Appellant/Plaintiff

vs.

1.Muthukrishnan
2.Venugopal .. Respondents/Defendants

Prayer: This Second Appeal has been filed u/s. 100 CPC against the Judgment and Decree dated 06.09.1996 made in A.S.No.186 of 1994 on the file of the Additional District Judge, Villupuram Ramasamy Padayachiyar District, Villpuram, confirming the judgment and decree dated 29.06.1994 made in O.S.No.486 of 1988 on the file of Principal District Munsif, Villupuram.

For Appellant : Mr.T.Dhanya Kumar

For Respondent : Mr.S.Krishnaswamy

JUDGMENT

This second appeal has been preferred against the decree and judgment in A.S.No.196/1994 on the file of the Additional District Judge, Villupuram. The plaintiff who has lost his case before both the courts below has preferred this second appeal. The plaintiff filed O.S.No.486/1988 before the Principal District Munsif, Villupuram, for declaration and consequential permanent injunction in respect of the suit property.

2. The short facts of the case of the plaintiff in the plaint relevant for deciding this appeal are as follows:-

The suit property originally belonged to one Vellan, who had two sons by name Samykannu and Nagappan and a daughter by name Sambatha. The suit property is S.No.394/1B measuring 0.65 cents. After the death of Vellan both the sons and the daughter Sambatha have partitioned the above said property taking each 0.22 cents. The plaint schedule property was allotted to the share of Sambatha after partition. The parties were in possession and enjoyment of

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their respective shares. The plaintiff's father Kannan was residing about 3 to 4 furlongs away from the suit property along with his father. The plaintiff's father got married in the year 1969. Since the hut of the plaintiff's father got damaged in fire, he along with his father had put up another hut in the suit property with the permission of Sambatha. Plaintiff's father was paying land tax and house tax. Patta No.63 was assigned to the suit survey number property. Plaitniff's grand father had put up a hut on the north of the suit property and was residing. The plaintiff from his birth residing in the hut situated in the suit property. The first defendant is residing 1 ½ furlongs away from the plaint schedule property in his hut. Plaintiff's grant father has put up a hut ½ furlong North of the first defendant's hut. The second defendant has put up a hut about 100 feet away from the hut put up by the plaintiff's grant father. The defendants are permanently residing for the past 20 years in the above said hut. The plaintiff's father was in the suit property after getting necessary permission from the original owner and he has subsequently purchased the suit property from Sambatha for Rs.4,000/-. As per the above said sale deed, the plaintiff's father was enjoying the plaint schedule property and he is in possession adverse to the interest of other sharers from 1960 onwards. The second defendant after knowing that the plaintiff has purchased the share of Sambatha had purchased in the suit survey number an extent of 0.12 cents from Samykannu and his sons on 05.02.1987. The first defendant also claims right in respect of 0.22 cents in the plaint schedule property on 14.12.1987 from the said persons. In the above said sale deeds, the boundaries for the property purchased under the said deeds were not correctly mentioned. The vendor has no valid title to convey any right under the above said sale deed in favour of the defendants. During the last week of November, 1987, the defendants made an attempt to interfere with the possession of the plaintiff in respect of the suit property. Hence, the plaintiff issued a notice dated 21.11.1987. In the said notice, the plaintiff has inadvertently mentioned that his house was constructed with stone. Plaintiff has received a reply notice dated 01.12.1987. Hence, the suit.

3. The second defendant has adopted the written statement filed by the first defendant as follows:-

The extent mentioned as 0.65 cents in the suit survey No.394/1B in the plaint is not correct. The total extent of the suit survey number property is 0.68 cents. The suit property was allotted to the share of Vellan, who had two sons by name Samykannu and Nagappan and a daughter by name Sambatha. But there was no partition entered into between them and the allegations in the plaint that they were each allotted 0.22 cents in the suit survey number property is false. It is also not correct to say that the

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plaint schedule property was allotted to the share of Sambatha. Sambatha was never in possession and enjoyment of the suit property at any point of time. The hut in the suit property was not put up by Sambatha. The patta No. assigned to the suit survey number property was 63 and not 81. The plaintiff is not in possession of the suit property from the date of alleged sale deed dated 12.12.1986. The plaintiff has not prescribed title by way of adverse possession. After the marriage in the year 1983 Sambatha never visited the suit survey number property. Samabatha's father Vellan died on 09.12.1943. After the death of Sambatha's father Vellan, Sambatha had no right or title over the suit property. The sons of Vellan namely Samykannu and Nagappan have partitioned the entire 0.68 cents in the plaint survey number property in equal moieties and they are enjoying their respective shares from the date of death of Vellan in the year 1943. The correct boundaries to the suit properties were not furnished in the schedule to the plaint. There is discrepancies in the four boundaries for the property scheduled to the notice issued by the plaintiff dated 21.11.1987. The first defendant has purchased 0.22 cents from Samykannu on 14.12.1981 and as per the partition dated 09.03.1983, the defendants have divided the said 0.22 cents equally among themselves allotting 0.11 cents each. The sale deed dated 14.12.1981 will bind the plaintiff. The suit survey No.394 has been sub-divided into Survey No.394/1B/1 measuring 0.10.5 ares. The second defendant had purchased the remaining 0.12 cents on 5.2.1987 from Samykannu, one of the sons of Vellan. The sons of Nagappan had executed a sale deed in respect of 0.18 cents in favour of third parties and they are in possession and enjoyment of the remaining extent of 0.16 cents in the suit survey number property. The tax receipts produced by the plaintiff are not related to the plaint schedule property. The Court fee paid in the plaint is not correct. The defendants never made any attempt to interfere with the possession of the plaintiff in respect of the suit property. Hence, the suit is liable to be dismissed.

4. On the basis of the above pleadings, the Trial Court has framed as many as ten issues and on the basis of the oral and documentary evidence, has come to the conclusion that the plaintiff has miserabily failed to prove his title and possession in respect of the suit property and consequently dismissed the suit without costs. Aggrieved by the findings of the learned trial judge, the plaintiff preferred A.S.No.186/1994 before the Additional District Judge, Villupuram, who has also dismissed the appeal confirming the decree and judgment of the trial Court in O.S.No.486/1988. Hence, the plaintiff has preferred this second appeal.

5. The substantial questions of law involved in this appeal are as follows:-

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i) Whether the plaintiff is entitled to the relief of injunction?

ii) Whether the plaintiff has prescribed title by adverse possession?

iii) Whether the plaintiff has proved title to the suit property?

iv) Whether the permission given by P.W.3 to the plaintiff's family to put up the hut in the suit property debars the plaintiff to acquire title by adverse possession against the defendants?

6. The point 1 to 4:-

6(a) The appellant claimed titled to the suit property under two means. One is under the sale deed dated 12.12.1986 under Ex.A.13 from one Sambatha, the daughter of the original owner Vellan. According to the appellant, the total extent of the suit property in S.No.394/1B is 68 cents and originally belonged to one Vellan, who died leaving two sons by name Samykannu and Nagappan and one daughter by name Sambatha and that after the death of Vellan, Samykannu, Nagappan and Sambatha have partitioned the plaint schedule property and in the partition each got 0.22 cents in the suit survey number property. The plaintiff would claim that he had purchased 0.22 cents in the suit survey No.394/1B from Sambatha. But as rightly held by the Court below that after the death of Vellan in 09.12.1943, the entire property devolved on Samykannu and Nagappan only, and Sambatha, the only daughter of Vellan, had no right of inheritance on the date of death of Vellan in the year 1943.

6(b) The plaintiff would claim right to the suit property by way of adverse possession too. According to the appellant, even before Ex.A.13-Sale deed, his father had put up a hut in the suit property and he was living therein from 1969. To substantiate this contention, the plaintiff has filed Ex.A.1 to A.11 house tax receipts. But the learned trial judge has rightly rejected the claim of the appellant/plaintiff's claim of adverse possession on the ground that Ex.A.1 to A11 receipts do not relate to the suit house. Ex.A.1 is of the year 1979 whereas Ex.A.2 to Ex.A.5 are relating to the year 1984, 1985, 1986 and 1988 in the name of the plaintiff Govindan. The suit was filed in the year 1988. There is no house tax receipt produced by the plaintiff for the period from 1980 to 1983. Ex.A.6 is dated 21.04.1979 in the name of Vellayutham Gounder, the grand father of the appellant/plaintiff. Ex.A.7 is dated 19.05.1984 in the name kannan the father of the appellant/plaintiff. If the plaintiff/appellant is in continuous possession of the suit property, then he would have produced the house tax receipt for the suit property for the

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period 1980 to 1983 also. There is no explanation forthcoming from the appellant/plaintiff for the non-production of the house tax receipt relating to the year 1980 to 1983. The only one land tax receipt produced by the appellant/plaintiff is dated 15.05.1985 under Ex.A.12. But all those receipts Ex.A1 to A12 are not related to the plaint schedule survey number property. If the case of the appellant/plaintiff is that he is in possession of the suit property from 1969 along with his father Kannan, then he would have prescribed title by adverse possession even by 1981 itself. Under such circumstances, there is absolutely no necessity for the plaintiff to take sale deed in the year 1986 from Sambatha under Ex.A.13. Further, Sambatha, the vendor, under Ex.A.13 had no right in respect of the suit property to convey the same in favour of the plaintiff as rightly observed by both the Courts below on the ground that Sambatha's father Vellan died in the year 1943 and on the date of death of Vellan, Sambatha is not entitled to inherit the property of Vellan.

6(c) Learned counsel appearing for the appellant relied on 2000(3) LW 848 (Thangamani Vs. Santhigagu) and contended that the plaintiff has specifically pleaded in the plaint that he has prescribed title to the property by way of adverse possession and on that score, he is entitled to a decree. The pleading in the plaint alone will not cloth the plaintiff with the right to claim adverse possession. The plea of adverse possession must be pleaded and proved. The plaintiff must prove that he is in possession of the suit property adverse to the interest of the real owners of the property. There is absolutely no evidence let in by the plaintiff to show that he was in possession of the plaint schedule property adverse to the interest of the two sons of Vellan viz. Nagappan and Samykkannu. The facts of the above said dictum runs as follows:-

> "According to the plaintiff in the said suit, the suit property is comprised in S.No.148/3 in Adiyanoothu Village. The entire extent was 1 acre and 65 cents. Originally, it was owned by one Kitheri Ammal and by a series of sales, the plaintiff purchased the property in the year 1972 from one Pitchamuthu Servai. He was doing personal cultivation in the suit property. The defendant owns the property north of the plaintiff's property and the same was comprised in Survey No.148/1B. Taking advantage of the fact that the plaintiff was an absentee landlord, the defendant in the course of one year had slowly encroached upon the plaintiff's property to an extent of 18 cents. He had shifted the ridge separating the properties to south and it was known to the plaintiff only two or three months prior to the filing of the suit. The plaintiff thereupon applied to the Tahsildar for measuring the property and accordingly, the Taluk

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Surveyor measured the property and found that a portion of the plaintiff's property had been encroached by the defendant. Though the defendant agreed to vacate the encroached portion he was refusing to hand over possession of encroached portion of 18 cents.

In the written statement filed by the defendant, it was contended that the ridge separating his property and that of the plaintiff's property was in its present form for the past several years. The land north of the ridge was originally owned by one Rayan Servai and by a series of sales, the defendant's father and uncle had purchased the property in 1943. In 1954, the defendant's father purchased the share of the defendant's uncle and became a full owner. After his death in 1970, the defendant was in absolute possession of the property and therefore, the defendant and his predecessors in interest have been in continuous possession of the property of the entire extent north of the ridge and hence perfected title by adverse possession to the knowledge of the plaintiff and his predecessors in interest. Therefore, the plaintiff has no title or possession over the suit property and he had not asserted title to the disputed portion.

The trial court held that the defendant had admitted the plaintiff's title in the written statement and therefore, it was not open to the defendant or his witnesses to go back from the recitals in the documents. As regards the claim of adverse possession by the defendant, it was held that the trespass could not have been before 1974 and since the suit had been filed in the year 1980 itself the said plea cannot be upheld. The appellate Court however, held that the evidence clearly established that the defendant was in possession of the disputed portion even long prior to the purchase by the plaintiff in the year 1972. With the result, claim of adverse possession by the defendant was upheld and the decree granted by the trial Court was set aside. Hence the Second appeal.

Relying on AIR 1947 PC 19 (Bibhabati Devi Vs. Ramendra Narayan), AIR 1964 SC 1254 (S.M.Karim Vs. Bibi Sakina), AIR 1971 SC 996 (State Bank of Travancore Vs. A.K.Panicker), AIR 1992 Karnataka 270 (Venkatachalaiah Vs. Nanjundaiah), AIR 1976 Madras 124 (Bhagavathy Vs. Savarimuthu), 1979(I) LW 419 (Karmega Kone Vs. Udayar Kone), AIR 1985 Orissa 40 (Naran Behera Vs. Mohan Jethi), 1995-1 LW 680 (Ponniyan Vs. Munian (died) and others), 1996(I) CTC 699 (Natesan Vs. Chinnachi Kandar), 1998-1 LW 244 (Roohnisha Beevi and 15 others Vs. AMM.Mahudu Mohamed and 29 others), 1998(2) LW 171 (The State of Tamil Nadu represented by

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The District Collector, Thiruchirrapalli Vs. K.Purushothaman), AIR 1934 PC 23 (Secretary of State Vs. Debendra Lal), AIR 1935 PC 36 (Srischandra Vs. Baijnath), AIR 1981 SC 707 (Kshitish Chandra Bose Vs. Commissioner of Ranchi), 1993 (4) SCC 375 (Parsinni Vs. Sukhi), it has been held by the learned judge of this Court as follows:-

> The expression that there should be animus against the real owner, came to be made in particular cases, where the question arose as to whether the contesting party was the real owner of the property or not and in cases where the person in possession was required to prove ouster strictly and particularly against the specific individual or individuals as in the case of a co-owner pleading ouster and adverse possession or a case of possession which was permissive at the inception and the person in occupation claims to have acquired hostile title vide AIR 1971 SC 996. But in cases where the occupier and the predecessors in title have been in open and continuous occupation asserting positive title in themselves and against every one, and the real owner does not take any step to assert his right and to interrupt the running of the period, there is no reason as to why the occupier cannot claim adverse possession. The following judgments emphasise that what is necessary is open and unconcealed possession and that it is not necessary that his possession should have been brought to the notice of the real owner.

6(d) The above said dictum will not be applicable to the present facts of the case, because even though there is a pleading in the plaint filed by the plaintiff to the effect that he is in possession by way of adverse possession, there is absolutely no evidence produced by the plaintiff to show that he is in possession of the plaint schedule property in continuous possession against the interest of the real owner for a statutory period of twelve years. The documents Ex.A.1 to A.12 produced by the plaintiff do not relate to the suit property. Under such circumstances, the claim of the plaintiff over the suit property under long continuous possession, which according to the plaintiff is adverse to the interest of the real owner cannot be sustainable. The title claimed by the plaintiff under Ex.A.13-sale deed dated 12.12.1986 cannot also be upheld because the vendor Sambatha had no right or title in respect of the suit property to execute a sale deed in favour of the plaintiff in the year 1986 because she has not derived any title to the suit property after the death of her father in the year 1943. Under such circumstances, I do not find any reason to interfere with the concurrent findings of the Courts below. Points are answered accordingly.

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7. In the result, the appeal is dismissed, with costs through out, confirming the decree and judgment of the first appellate Court in A.S.No.186/1994 on the file of the Additional District Judge, Villupuram.

ssv

Sd/
Asst.Registrar

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Sub Asst.Registrar

To,

1.The Additional District Judge,
Villupuram Ramasamy Padayachiyar District,
Villpuram.

2.The Principal District Munsif,
Villupuram.

3. The Section officer, VR Section, High Court, Madras.

+ 1 cc to Mr. S. Krishnasamy, Advocate SR No. 138

+ 1 cc to Mr. T. Dhanyakumar, Advocate SR No. 304

BK(CO)
SR/20.2.2007

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